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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1032

HAMILTON NATIONAL BANK OF KNOXVILLE,
Executor of the Estate of John Edd Bradley,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

H. H. McCAMPBELL, JR.,
Burwell Building,
Knoxville, Tennessee 37902,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Sixth Circuit.

The Hamilton National Bank of Knoxville, Executor of the Estate of John Edd Bradley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on December 17, 1965.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Tennessee, Northern Division, is reported at 229 F. Supp. 885. The opinion of the Court of Appeals for the Sixth Circuit has not been reported and is found in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 17, 1965, and copy thereof is appended to this petition in the appendix, at pp. 11-28. The jurisdiction of this Court is invoked under U. S. C. 28, 1254 (1). This suit was instituted by the petitioner to recover federal estate taxes, with interest, alleged to have been overpaid by the petitioner as Executor of the Estate of John Edd Bradley, who died on March 10, 1961. The sole question before the District Court, and before the United States Court of Appeals on appeal by the Government, was whether year's support, provided by the laws of Tennessee for the surviving spouse, was a terminable interest within the meaning of Section 2056 of the Internal Revenue Code of 1954. The District Judge held that it was not, the Court of Appeals reversed.

THE QUESTION PRESENTED.

The question presented is: Is the year's support provided by the laws of the State of Tennessee for a surviving spouse, whether the estate be intestate or whether the surviving spouse acquires the right to year's support under Tennessee law by dissenting from the deceased spouse's will in a testate estate, a defeasible interest within the meaning of Section 2056 of the Internal Revenue Code of 1954? In the instant case the question might

be narrowed to the latter of the foregoing alternatives, for, in fact, the surviving widow of the decedent, John Edd Bradley, dissented from his will, which made no provision at all for her, and was awarded year's support.

STATEMENT.

This suit, instituted pursuant to the provisions of Title 28, U. S. C., Section 1346 (a) (1), was an action against the United States for the recovery of an Internal Revenue tax alleged to have been erroneously and illegally assessed and collected to the extent that it was excessive. Petitioner duly qualified as the Executor of the Estate of John Edd Bradley, who died testate in Knox County, Tennessee, on March 10, 1961. He was survived by his widow, who was his second wife, he having been formerly married but divorced. His will made no provision for the widow. She dissented from his will and by appropriate proceedings under Tennessee law was awarded year's support in the sum of $8,400, which the Executor claimed was entitled to marital deduction treatment pursuant to Section 2056 (a) of the Internal Revenue Code of 1954. The deduction was disallowed and a deficiency was paid to the Government of $1,548.78. It was the position of the Government that this year's support was a terminable interest within the meaning of Section 2056 (b) (1) of the Internal Revenue Code of 1954.

The parties, as well as the courts which have considered the matter, all agree that the question under consideration is to be determined by the law of the State of the decedent. The District Court held that under the laws of the State of Tennessee the year's support here under consideration was not defeasible. The opinion of the District Court was entered on March 3, 1964, and accordingly the opinion of this Honorable Court in Jackson v. U. S., 376 U. S. 503, could not have been noted by the

District Judge for it was not entered until March 23, 1964. The Court of Appeals, however, noting Jackson and concluding that the year's support herein involved was a defeasible interest, citing two old North Carolina cases and a decision of a District Court sitting in North Carolina applying North Carolina law, reversed the District Court.

REASONS FOR GRANTING THE WRIT.

The decision below should be reversed because it erroneously interprets the law of Tennessee as it applies to the matter of year's support allowable to widows in intestate estates, or dissenting in testate estates, and we believe carried the decision in the Jackson case beyond the intent of this Court in that decision. Indeed, if the Court of Appeals for the Sixth Circuit is affirmed in the instant decision, it is inevitable that the Bureau of Internal Revenue will apply the result not only to year's support, but also to dower, homestead, and other statutory interests that widows in intestate estates acquire pursuant to Tennessee law.

We consider it an unnecessary prolongation of this petition to refer this Court to the many decisions of the various District Courts and Courts of Appeal that have considered the matter. The District Court in this case refers to many of the Tennessee cases, as well as to cases coming up to the United States Court of Appeals for the Sixth Circuit, particularly Dougherty v. U. S. (1961), 292 F. 2d 331, and some cases from the District Courts in Kentucky, as well as Michigan, Virginia and Illinois. Granted that all of these cases antedate Jackson. The Government, on the contrary, has relied most heavily on U. S. v. Edmondson, 331 F. 2d 676 (C. A. 5, 1964), wherein the U. S. Court of Appeals for the Fifth Circuit reversed its prior decision in U. S. v. First National Bank & Trust Company of Au-

gusta, 297 F. 2d 312 (C. A. 5), in a per curiam opinion following the decision in Jackson. Both of the foregoing cases were based on the probate law of the State of Georgia and it is to be noted that no petition for certiorari was filed with this Court in the Edmondson case.

We regard the subject of this petition as being of national importance though the immediate problem is simply that of one estate being administered in Tennessee. We say of national importance because the Revenue Code from which it arises was enacted in the first place to remove the inequality of taxation from so-called community property states and so-called common law states, the latter having suffered higher taxes under the applicable Internal Revenue Codes than the former. Practically all states east of the Mississippi River fall in the category of common law states.

We think for the purpose of this argument that an important immediate differentiation should be made in the classes of cases with which we are concerned. We would divide these classes as follows:

1. Community property states wherein by statute there are support provisions granted to widows in addition to the provision made for them by will of the deceased husband. It is into this category that Jackson falls.

2. Intestate estates in common law states.

3. Testate estates in common law states, where the will of the deceased spouse makes no provision for the surviving spouse and the surviving spouse dissents from the will and thereby achieves the position that a widow would have in Category 2 above. It is in this third category that the case at bar falls.

Preliminarily, we submit as our first proposition that Jackson should not necessarily be decisive of all cases

arising under Categories 2 and 3 above. Indeed, it should not **necessarily** be decisive of all cases arising under Category 1 above.

Generally speaking, in most of the Southern States, and certainly in the instance of Tennessee, there has been very little change in the statutory probate law over a period of 150 years. These statutes were enacted long before the conception of inheritance and estate taxation arose in American law. Their effect should be judged, we submit, in the light of their history. They were enacted to accord to widows generally a cloak of monetary protection during widowhood that was not ordinarily available to them otherwise. Therefore, the decision of the case at bar will affect widows in many of the States of the Union who find themselves in either Categories 2 or 3 above. Affirmance of the decision of the U. S. Court of Appeals for the Sixth Circuit would result in an increase in the impact of taxation on those estates generally of smaller dollar value, least able to bear it. It is no answer to this problem to say, as did this Court in Jackson:

> "The achievement of the purposes of the marital deduction is dependent to a great degree upon the careful drafting of wills; we have no fear that our decision today will prevent either the full utilization of the marital deduction or the proper support of widows during the pendency of an estate proceeding."

As we pointed out to the Court of Appeals for the Sixth Circuit, no amount of will draftmanship can deprive a widow of her right to dissent, and it is inevitable that she will dissent if no provision, or no adequate provision, is made for her in the will of her deceased husband. Therefore, the question is whether a widow who exercises her right to dissent under these circumstances is going to find herself penalized thereby taxwise. We do not believe this Court intended that result.

Tennessee law as considered in the opinion of the Court of Appeals should be reviewed at this point. Among other things, the Court in opinion refers to the Tennessee cases of Hamilton National Bank v. Haynes, 180 Tenn. 247 (1943); Pope v. Alexander, 194 Tenn. 146 (1952); and Pinkerton v. Turman, 196 Tenn. 448 (1953). It should be pointed out immediately that each of these cases involves a testate estate. In both Hamilton National Bank v. Haynes and Pope v. Alexander, substantial provision was made in the deceased spouses' wills for the surviving spouses. In each the surviving spouse died a short time after the death of the deceased spouse. In each the personal representative of the dying surviving spouse sought the instruction of the court pursuant to the provisions of TCA 31-611, as to whether to dissent from the will of the first dying spouse. In each the court held that where substantial provision was made in the will of the first dying spouse for the surviving spouse, dissent was not indicated and would not be instructed. We respectfully submit that none of these three Tennessee decisions bring up the crux of this problem, which is the matter of the year's support for a surviving widow provided for by Tennessee law.

The District Court, in a well reasoned opinion, closely analyzed the Tennessee cases and the Tennessee statutes. In all candor, we must hasten to say that there is no Tennessee case precisely upon the point of what disposition is to be made of homestead, dower, year's support, money on hand, crops and farm tools in an intestate estate where the widow dies during the period of administration. As we have noted earlier, the decisions in the testate estates involving TCA 31-611, are not in point to the problem here presented. On the other hand, TCA 31-611 makes manifest that the statutory law of Tennessee provides for the contingency of the death of a widow prior to exercising her right to dissent, and certainly con-

templates dissent after death in an appropriate situation. We urge the Court to consider that in any case where the deceased spouse's will makes no provision for the surviving widow, it is the statutory policy of Tennessee that her right to dissent be preserved. Furthermore, though as we have said, the precise question here raised has not been passed on by the Supreme Court of Tennessee, it is nevertheless, manifest from the decided cases which were so ably analyzed by the District Judge below, that the policy of Tennessee is to accord to the surviving widow all of her rights under the intestacy statutes, no matter how long after the death of her husband she survives. Viewed in this light, and the Court of Appeals cited no Tennessee case to the contrary, the interest here under consideration is not a defeasible interest under Tennessee law.

In Wachovia Bank & Trust Co. v. U. S., 234 F. Supp. 897 (D. C., N. C. 1964), referred to by the Court of Appeals in opinion, it is there said that under the law of North Carolina, the administrator is only under a duty to assign the year's allowance upon the written application of the widow, signed by her, and within one year from the decedent's death. The court goes on to say that if these requirements are not met there is no duty to assign the allowance, therefore it is terminable, and following the Jackson opinion, the court holds the widow's year's allowance is not part of the marital deduction. There apparently was no appeal of that case. That case, however, does point up the problem that has been stated in this petition. It is our insistence again that this Honorable Court did not intend that Jackson be carried so far. It is always argued by the Government that if there is enough dissatisfaction with the law in cases of this type, the relief sought should be at the hands of the Congress. One might well add that if the law is as some district courts and some appellate courts which have considered

the matter say, and which the Government contends it is, and Congress fails to grant relief, then the respective State Legislatures provide the only remaining source of correction. This multitude of State legislation altering their various probate statutes to avoid the result thus brought about by Jackson will again produce the turmoil that the marital deduction legislation sought to quiet. We do not believe that this Court intended to bring on this condition. Indeed, in the concluding sentence of the opinion in Jackson, so much is said.

If this Honorable Court accepts the assertion of counsel that the Tennessee cases and the Tennessee statutes in intestacy situations create nondefeasible interests in surviving widows, particularly the right to year's support, and accepts the further proposition that the general rule is to be followed in testate estates where the will makes no provision for the widow, then obviously, the decision of the Court of Appeals below is erroneous.

Even if, however, there be doubt as to Tennessee law, it is the further position of the petitioner that it was not the intention of this Court in the Jackson case to bring about the result that the petitioner is facing here. The solution to the difficulty is easily found. Were this Court to say that in intestate estates, as well as in testate estates where no provision is made in the will of the decedent for his widow and she has the statutory right to dissent, as applied to common law states, that the current statutory allowances for the surviving spouse are entitled to marital deduction treatment, this problem would thereby be eliminated immediately.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted:

1. That this petition for a writ of certiorari should be granted.

2. That the judgment of the Court of Appeals should be reversed and the judgment of the District Court for the Eastern District of Tennessee should be reinstated and affirmed.

Respectfully submitted,

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H. H. McCAMPBELL, JR.,
Burwell Building,
Knoxville, Tennessee 37902,
Attorney for Petitioner.